SUMMARY OF COOPERATIVE CASES

Prepared
Under the direction of
RAYMOND J. MISCHLER, ATTORNEY
OFFICE OF THE GENERAL COUNSEL, U.S.D.A.

UNITED STATES DEPARTMENT OF AGRICULTURE
FARMER COOPERATIVE SERVICE

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The comments on cases reviewed herein represent the personal opinion of the author and not necessarily the official views of the Department of Agriculture.

FEDERAL TAXATION - DEDUCTION OF PATRONAGE REFUNDS - PROOF OF ANTECEDENT LEGAL OBLIGATION

(The Farmers Elevator Co. of East Grand Forks, Minnesota v. Commissioner of Internal Revenue, T. C. Memo. 1962-204 (Docket No. 85149), filed August 27, 1962)

The only issue in this case was whether the refunds the cooperative had made on a patronage basis were paid pursuant to an antecedent legal obligation. The Commissioner had held that the cooperative's bylaws were permissive, not mandatory, and had determined deficiencies for five fiscal years ending May 31, 1958, totalling $102,419.80. The Tax Court sustained the cooperative in its contention that the patronage dividends it had paid during these years were properly excludible in computing its taxable income.

The Cooperative (hereinafter referred to as Farmers) is primarily engaged in buying, storing, and selling grain. It was organized in 1911 under the general laws of Minnesota. However, at a special meeting of the shareholders in 1944, it was unanimously determined to amend Farmers' bylaws so as to comply with the Capper-Volstead Act (7 U.S.C. 291-2). Additional pertinent facts found by the court are abstracted below:

> "The proposed new bylaws were adopted as submitted and have since been continuously in effect through May 31, 1958, without pertinent change. The bylaws adopted in 1944 contained, inter alia, the following provisions:
>
> "ARTICLE 111. MEMBERSHIP
>
> "Section 1. QUALIFICATIONS. Any person, firm, partnership, corporation or association, including both landlords and tenants in share tenancies, who may be the producer of any of the farm products handled by the corporation in any territory tributary to the shipping points of this corporation, may become a member of this corporation upon application accepted by the Board of Directors, by agreeing to comply with the requirements of these By-Laws, and by purchasing at least one share of the capital stock, and by meeting any other requirements at /sic/the Board of Directors.
>
> "Section 2. TERMINATION OF MEMBERSHIP. In case of the death of a member, or if a member ceases to be eligible as prescribed in Section 1, or removes from the territory tributary

to the shipping points of the corporation, or ceases to patronize it for a period of three (3) consecutive years, or shall fail to comply with these By-Laws and other requirements, the corporation, through its Board of Directors, may elect to purchase his share or shares and terminate his membership, upon tender to him, or his heirs or legal representatives, of the book value of his share, together with any dividends or patronage refunds due and unpaid, less any indebtedness then due the corporation."

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"ARTICLE IV. MEETINGS

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"Section 2. ANNUAL STOCKHOLDERS' MEETINGS. The annual meeting of the stockholders of this corporation shall be held at the place designated by the Board of Directors in the city of East Grand Forks, Minnesota, on the third Saturday in July, at the hour designated by the Board of Directors, but if on a holiday (legal), on the next business day following said meeting to continue from day to day until the business to be transacted shall be finished.

"Section 3. SPECIAL MEETINGS OF STOCKHOLDERS. Special meetings of the stockholders of the corporation may be called at any time by the President and Secretary, or on petition, in writing, signed by at least twenty (20) stockholders. * * *"

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"ARTICLE VI. DUTIES OF DIRECTORS

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"Section 4. AUDITS. At least once each year the Board of Directors shall secure the services of a competent and disinterested public auditor or accountant who shall make a careful audit of the books and accounts of the corporation and render a report thereon in writing, which shall be submitted to the members of the corporation at their annual meeting. This report shall include at least; (1) A balance sheet showing the true assets and liabilities of the corporation; (2) An operating statement for the fiscal period under review which

shall show the cost of an income from sales, and the gross income or loss from each of the commodities handled during the period; (3) An itemized statement of all expenses for the period under review; (4) A statement of the market position of the elevator at the close of the period; (5) A statement of the outstanding storage receipts at the close of the period; (6) A statement of weights and quantities of commodities received and accounted for, showing overages or shortages in each commodity handled; and (7) A certified statement of inventories to be obtained in the manner and form prescribed in the following section."

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"ARTICLE IX. DISTRIBUTION OF INCOME

"Section 1. METHOD OF DISTRIBUTION. At the end of the fiscal year, after paying the expenses of the corporation for operation and otherwise, and after setting aside such reserves for depreciation of building, machinery, equipment and office fixtures as may be permitted by law and by the rules, regulations and permissive practice of the pertinent taxing authorities, and after providing for payments on interest or principal of long-time obligations of the corporation or on amortized debts of the corporation incurred in the conduct of its business, and after having provided for the purchase of necessary supplies or equipment, the Board of Directors shall apportion the net income, insofar as funds are available, in the following order and manner:

"1. By paying dividends upon the paid up capital stock which shall not exceed six (6) per cent per annum.

"2. By setting aside such reserve for permanent surplus as the Board deems advisable and as permitted by law and by the rules, regulations and permissive practice of the pertinent taxing authorities.

"3. The balance of such net income may be apportioned between all patrons of the corporation as provided in the following section.

"Section 2. METHOD OF PAYING PATRONAGE REFUNDS. Patronage refunds shall be paid in cash to all patrons of the corporation, except that in the case of a patron who is eligible for membership in the corporation and who is not the owner of at least two (2) shares of the capital stock of the corporation, patronage refunds shall be credited to the account of such patron until the account shall equal the book value of two (2) shares of stock. The corporation shall issue and deliver to such patron a share of stock when his said patronage refunds, or credits thereto, shall equal the book value of one (1) share of stock, and a second share when said patronage refunds, or credits thereto, shall equal the book value of the second share of stock. If after the payment of operating expenses and dividends on capital stock, and the setting aside of reserves for necessary purposes, it is found possible to declare a patronage refund but the financial condition of the corporation does not permit of immediate payment being made either in whole or in part, payment of any or all of such patronage refunds shall be deferred by the Board of Directors until sufficient funds have been accumulated to permit payment in cash. The corporation shall keep and maintain records showing the interests of said patronage refund holders in the assets of the corporation.

"1. Grain rate: The total net income from grain operations, after deducting an equitable proportion of all expenses and an equitable proportion of appropriations provided for in Section 1 above, shall be divided among the grain patrons of the corporation upon the basis of the dollar value of sales of each kind of grain by each patron, or in such other equitable manner as may be determined upon by the Board of Directors.

"2. Merchandise rate: The total net income accruing from the handling of merchandise and supplies and from other miscellaneous sources, after deducting an equitable proportion of all expenses and an equitable proportion of appropriations provided for in Section 1 above, shall be divided upon the basis of the dollar value of sales to each patron, or in such other equitable manner as may be determined upon by the Board of Directors."

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"ARTICLE X. MISCELLANEOUS PROVISIONS

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"Section 4. BUSINESS WITH NON-MEMBERS. This corporation is operated for the mutual benefit of its members and patrons, and shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members."

"During the years 1954 through 1958 petitioner had between 900 and 1,000 stockholders. Approximately 800 of these same stockholders had held stock in petitioner since May 13, 1944, when the new bylaws were adopted.

"Since their adoption on May 13, 1944, copies of the bylaws have been kept in petitioner's offices and made freely available to any patrons who wanted to read them. Also, they were made available frequently at petitioner's annual stockholder meetings.

"All of petitioner's patrons upon delivering their grain to petitioner's elevator expected to receive patronage dividends, should petitioner's operation for the year result in a profit. However, they understood that the board of directors had authority to retain what was needed for the reasonable needs of the business.

"The officers and board of directors of petitioners also understood that petitioner was obligated to return dividends, if and when earned, to the patrons on a patronage basis. They further understood that the board of directors had discretion in setting aside amounts for the reasonable needs of the business."

The court then cited records to show that Farmers had paid refunds to patrons in all the years between 1945 and 1958, except in 1946. In the fall of 1945, its elevator burnt. When the members decided to rebuild, it was understood that it would probably be necessary to not pay patronage dividends in 1946. Farmers did retain all income from its reduced operations in 1946 and a part of such income from the years 1947-1952 to pay the costs (in excess of $40,000 insurance received) in rebuilding its plant for $85,000.

"In the years in which refunds were made to patrons by petitioner, the procedure for effecting such refunds was to take a year-end inventory and determine the net profits for the year, ascertain the amount and type of grain sold to petitioner by its patrons, and supply all of this information to the board of directors who, at a meeting called for that purpose, would divide the net profits.

"At the above-mentioned meetings the directors customarily discussed and determined the portion of the profits which would be retained as surplus. They were guided by no fixed formula in making that determination. No amount from grain income was, in fact, set aside for surplus during the years in issue. The directors then declared a 6 percent dividend on capital stock. They also determined whether bonuses should be paid to employees and, if so, the amounts. Thereupon the directors would authorize the payment of the remainder of the year's net profits to patrons on the basis of the extent of their patronage during that year."

The court also found that:

"At some time in or prior to 1948 Albert Tabert, petitioner's business manager, was instructed orally by petitioner's directors and officers to promise its grain patrons who delivered their grain to petitioner and prospective patrons, that they would be paid refunds based on patronage if there were patronage income from grain.

"In accordance with the directions given him by the directors and officers, Tabert did, on various occasions, personally solicit grain from approximately 90 percent of petitioner's patrons with the promise that petitioner would refund its income from grain operations on the basis of patronage. Tabert did not promise any patron that he would receive any stated definite amount or that the patrons as a whole would receive a stated definite proportion of net income earned by petitioner."

On these facts the Tax Court reached this conclusion:

"The provisions of petitioner's bylaws, read as a whole, sustain petitioner's contention that they require the distribution as patronage dividends of its net income after payment of dividends not to exceed 6 percent on capital stock and the setting aside of reserves for necessary purposes to meet the reasonable needs of its business. We agree with petitioner that the provision of section 2 of article IX of its bylaws referring to the method of paying patronage dividends makes it clear that section 1 of article IX providing for the method of distribution of income is mandatory in its requirement of payment of patronage dividends. Not only do we agree with petitioner that its bylaws require the payment of such patronage dividends, but we further agree with petitioner that the evidence establishes that in most instances an oral contract to pay such patronage dividends if the corporation

had net income from its grain operations was made by petitioner with the various patrons at the time of the purchase of their grain.

"There have been a number of cases involving the exclusion of patronage dividends from the income of cooperatives with articles of incorporation, bylaws, or agreements with patrons which reposed in the board of directors discretion to allocate to various reserves before any amount was to be paid to patrons as patronage dividends. Clover Farm Stores Corporation, 17 T.C. 1265 (1952), (the exclusion was allowed where taxpayer's bylaws provided in substance that the excess of gross revenues for the year over its expenses, losses, reserves, and certain other charges be paid as patronage dividends); Dr. P. Phillips Cooperative, 17 T.C. 1002 (1950), (the exclusion was allowed where income was to be distributed but the taxpayer could establish and maintain reasonable and necessary reserves); Colony Farms Cooperative Dairy, Inc., 17 T.C. 688 (1951), (the exclusion was allowed where the taxpayer's contract with members provided for its retaining from sales proceeds amounts necessary to meet operating and maintenance expenses or to provide reserves for any proper purpose); Producers Crop Improvement Association, 7 T.C. 562 (1946), (the exclusion was allowed where provision was that earnings were to be distributed to vendees after setting aside reserves, surplus, and working capital); Midland Cooperative Wholesale, 44 B.T.A. 824 (1941), (exclusion of patronage dividends was allowed to a Minnesota cooperative where its bylaws included among the deductions from receipts to determine amounts distributable to patrons 'at least ten percent (10%) of the annual income' as a permanent surplus until such reserves shall equal the paid-up capital). However, in none of these cases was the issue raised whether the discretion in the board of directors to allocate income to the various reserves prior to distribution of patronage dividends negated the existence of a pre-existing legal obligation to pay such patronage dividends. In several cases the Government had allowed deduction of amounts actually distributed as patronage dividends notwithstanding the fact that the boards of directors in those cases had broad discretion to allocate net income to reserves.

"Respondent recognizes that in a number of decided cases involving provisions for reserves under State law governing cooperatives, corporate charters, bylaws, or contractual agreements with patrons indistinguishable from the provision of petitioner's bylaws as to reserves for surplus, he has not

challenged the exclusion of the patronage dividends because of such provisions. He, nevertheless, contends that these cases do not control the instant case, since in the instant case he does contend that if petitioner's bylaws or oral agreements with its patrons are interpreted as requiring the payment of patronage dividends, the amount, if any, which would be paid was so indefinite because of the provision in petitioner's bylaws for reserves for permanent surplus as in effect to negate the existence of any pre-existing legal obligation to pay such dividends."

The Tax Court then discusses this contention of the Commissioner, but concludes it is not well founded. Finally, it disposes of the Commissioner's last argument as follows:

"Respondent relies in support of his contention primarily on United Cooperatives, Inc., 4 T.C. 93 (1944). In that case the corporate bylaws empowered the board of directors to pay dividends on the capital stock not to exceed 8 percent of the par value thereof, to set aside a reserve for depreciation in an amount to be determined by the directors but not less than 5 percent, and to remit the remaining net income to the patrons as a patronage dividend. During the taxable year there involved no dividends were declared on the stock and practically all the net income was repaid to the patrons in dividends. Exclusion of patronage dividends to an amount equal to 8 percent of the par value of the capital stock was denied since the directors had full discretion to divert income to this extent away from patrons and pay it as dividends to stockholders, thus negating any legal obligation to pay patronage dividends to the extent of such amount.

"In the instant case, had the directors not declared the 6 percent dividend on capital stock, a situation comparable to that existing in United Cooperatives, Inc., supra, would be here present. However, here the 6 percent dividend on capital stock was declared each year and the amounts of petitioner's surplus during these years were reasonable so that there existed no uncontrolled discretion in the directors such as existed as to the 8 percent dividend payment in United Cooperatives, Inc., supra."

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TRADE REGULATION - REFUSAL TO SELL - PRIVATE SUIT FOR TREBLE DAMAGES DECIDED AGAINST COMPLAINANT

(Ben B. Schwartz & Sons, Inc. v. Sunkist Growers, Inc., D.C.E.D. Mich., 203 F. Supp. 92 (1962))

This action was brought by a corporation and certain individuals engaged in the wholesale food and produce business for treble damages for injury to their business by reason of conduct of defendant in refusing to sell its citrus fruits directly to plaintiffs in alleged violation of the antitrust laws, including the Robinson-Patman Act. The District Court held that, since plaintiffs did not purchase directly from defendants, they were not "purchasers" within the Robinson-Patman Act and for that reason could not maintain an action under such Act for alleged discrimination by the defendant. It held, further, that an action could not be supported under the Act based upon defendant's refusal to sell directly to them in the absence of any showing of monopolistic power. Accordingly, judgment was entered for the defendant.

Ben B. Schwartz & Sons, Inc., (hereinafter referred to as "plaintiffs") is a Michigan corporation doing business in the City of Detroit, and Sunkist Growers, Inc., (hereinafter referred to as "Sunkist") is a corporation organized under the laws of the State of California and is authorized to do business in the State of Michigan. Its Michigan offices are located in the city of Detroit.

Plaintiffs brought action for treble damages for alleged injury to their business by reason of acts and conduct by Sunkist allegedly contrary to, and forbidden by, the antitrust laws of the United States, particularly but not limited to applicable portions of § 2 of the Robinson-Patman Act (15 U.S.C.A. § 13). The Court acknowledged jurisdiction under 15 U.S.C.A. § 15.

Plaintiffs alleged that a substantial portion of their business during the four year period covered by the suit was the buying of citrus fruits from growers, their agents and representatives, and the selling of such fruits at wholesale to retailers and distributors throughout the city of Detroit, and adjacent areas. During the period in question Sunkist was the exclusive distributor of California citrus fruits bearing the brand or trade-mark name of "Sunkist." Plaintiffs said that during the period covered by the complaint Sunkist sold "Sunkist" citrus fruits in carload lots to certain dealers in the Detroit trading area but at the same time refused to sell in carload lots to plaintiffs, although plaintiffs sought to purchase from Sunkist on carload lot basis, and that they maintained facilities for handling and storage of citrus fruits equivalent to the facilities to those possessed by the buyers to whom sales in carload lots had been made by Sunkist.

Plaintiffs further alleged that because of their inability to purchase citrus fruits from Sunkist in carload lots, they were required to obtain such fruits at auction sales conducted by an agent of Sunkist known as Detroit Fruit Auction Company. The plaintiffs contended that their inability to purchase citrus fruits from Sunkist in carload lots while it was selling to other buyers in the Detroit trading area in this manner was a discrimination prejudicial and damaging to plaintiffs, contrary to the antitrust laws of the United States. By reason of this situation plaintiffs claimed that they had been unable to purchase at any determined price for later delivery and were therefore unable to quote any firm advance price to customers as they would have been able to do had they been permitted to order for direct delivery to them in carload lots.

The plaintiffs further alleged that because of their having to buy from the Auction Company, they were forced to expend not less than ten cents per box of "Sunkist" brand citrus fruit for handling charges and expenses in then transporting the items from the Auction Company's premises to their premises and for other miscellaneous expenses, which the carload lot buyers avoided and which plaintiffs would have avoided had they been privileged to buy in carload lots.

As a result of the foregoing, plaintiffs alleged that they were forced to accept a substantially decreased profit margin by reason of the alleged unlawful discriminatory sales policy and conduct of Sunkist, and claimed that their injury and damage had been not less than $50,000, plus additional costs of doing business. In all, plaintiffs sought to recover damages "not in excess of Two Hundred Thousand Dollars ($200,000.00)," proper court costs and attorney fees.

Sunkist, on the other hand, denied liability in any degree. It set forth the factual basis for its contention that it was at all times a nonprofit agricultural cooperative marketing association, acting for the mutual help and benefit of its members as producers of agricultural products. It alleged that it made carload lot sales in the Detroit area only to retailers and had made none to wholesalers or jobbers such as the plaintiffs. It said that plaintiffs could buy, and had bought, "Sunkist" brand citrus fruit at the Detroit Fruit Auction Company which conducted sales open to anyone attending the auction, whether they are jobbers, wholesalers, or retailers.

One defense alleged by Sunkist was that it was exempt under section 6 of the Clayton Act and under the Capper-Volstead Act, but this defense was abandoned after the Supreme Court decision in the Maryland and Virginia case (See Summary, Legal Series No. 13, p. 18 (1960)).

After reviewing the facts, the court concluded that "the alleged violations of 15 U.S.C.A. § 13(e) are not within the purview of said statute. The prohibition contained in the statute is therein stated to be discrimination 'in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale * * *' . . . The testimony not only fails to establish that plaintiffs are purchasers from defendant but establishes positively that they do not purchase from defendant. That is one of their complaints -- that defendant refuses to sell to them. Chief Judge Biggs states unequivocally that one must be a direct purchaser to be entitled to protection under the Act. Klien v. Lionel Corp., 3 Cir., 1956, 237 F.2d 13. This seems to us to be in accord with the plain language of that section of the Act."

As to the right of Sunkist to refuse to sell directly to plaintiffs, the court said it agreed with the conclusion in Judge Moore's opinion in Atlanta Trading Corp. v. Federal Trade Commission, 2 Cir., 1958, 258 F.2d 365, 372-373, which contains the following language: "Nothing in the Robinson-Patman Act imposes upon a supplier an affirmative duty to sell to all potential customers. Absent monopolistic power, a seller may refuse to deal with anyone. * * * All that the Act requires is that a seller give fair and equal treatment to all those to whom he elects to sell products of like grade and quality."

The court further cited Skinner v. United States Steel Corp., 15 Cir., 1956, 233 F.2d 762, 765-766, for the reason that plaintiffs had advanced the somewhat tenuous theory that the "services or facilities" recited in the Act can be interpreted as referring to the conduct of a seller in permitting or refusing to permit a potential purchaser to become an actual purchaser. He rejected this argument on the ground that the Skinner case stands for the proposition that "the services or facilities that must be made available on proportionally equal terms to all purchasers in competition are merchandising services or facilities." (Emphasis supplied.)

In concluding, the court said that, in the interests of completeness, although going to the issue of damages (which issue the court did not reach because of its conclusion of non-liability), the only proper formula for determining damages (if in fact the alleged violations were actionable) would be one based upon the difference between what plaintiffs paid for the commodity at auction and what they would have paid at direct sale at the same times for merchandise of like grade and quality. There was no testimony adduced that would supply the figures necessary to the employment of such a formula, nor was there any testimony that such figures were (or would be) difficult of ascertainment.

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AGRICULTURE - VALIDITY OF MILK ORDER NO. 127

(Willow Farms Dairy, Inc. v. Freeman, U.S.D.C. D. Md., 206 F. Supp. 239 (1962))

The Department of Agriculture's order establishing the Upper Chesapeake Bay Marketing Area milk pool so as to include Eastern Shore handlers and farmers in the same marketing area as Baltimore, even though they cannot sell milk there, was held to illegally discriminate against such handlers and farmers.

The court pointed out that the order was adopted because of "the difficulties the cooperative was having with the city handlers, and the resulting surplus of milk in the hands of the cooperative which it could not dispose of as Class I milk. The county handlers and the farmers who sell to them do not contribute to that surplus, because their milk cannot be sold in the City. Nevertheless, the Secretary included the rural counties in the marketing area because some of the city dairies, notably National, sell in those counties.

"Naturally the large city handlers and the cooperative, which desired and needed a pool for the City market, wanted the Secretary to include the county dairies in the pool, because as a result of the greater Class I use by the county dairies they were bound to contribute more than they took out, and would to that extent subsidize the City handlers. It cannot be said that there is no evidence in the record to support the decision of the Secretary, but on the record taken as a whole it does not appear that the Secretary gave due regard to the equalization of the burdens with the benefits. He included Carroll County and other rural counties in the marketing area in order to include the county handlers and their farmers in the pool, for the sole benefit of the city handlers and the cooperative, and to the detriment of the county handlers and the farmers who sell to them, without any corresponding benefit to the county handlers and their farmers. That action was contrary to the principles applied in Thompson v. Consolidated Gas, 300 U.S. 55, and Retirement Board v. Alton R. Co., 295 U.S. 330, and recognized in the United States v. Rock Royal Co-op, 307 U.S. 533, and H. P. Hood & Sons v. United States, 307 U.S. 588, cases"

The court also found the order invalid on two other grounds:

1. Prices fixed by a milk marketing order for an area must be adjusted to reflect the price of feeds, available supplies of feeds, and other economic conditions which affect the market supply and demand for milk. The court found that this order

did not properly fix the prices in the manner required by the statute because (1) the Secretary had not considered the parity price of milk sold in the marketing area; (2) the Secretary did not regard such parity price as relevant; and (3) there was no evidence in the promulgation proceeding relating to parity.

2. Section 608(c)(9) of the Agricultural Marketing Agreement Act requires approval of the order by two thirds of the milk producers affected by the order, not merely two thirds of the producers covered by the order. The court found that the Secretary's order, by defining "producers" and limiting the voting to such producers, had too narrowly restricted the field of voting.

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MILK MARKETING ORDERS - "COMPENSATORY PAYMENTS" - PROVISIONS HELD INVALID

(Knudsen Brothers Dairy, Inc. v. Orville L. Freeman, 303 F. 2d 886)

The District Court for the District of Connecticut granted summary judgment to the plaintiff holding that a provision of a milk marketing order which required compensatory payments by milk handlers who purchased milk outside the region covered by the regulation was invalid. An appeal was taken. The appeal was argued on May 4, 1961, but the court withheld a decision because the Supreme Court had granted certiorari in the Lehigh Valley Cooperative Farmers, Inc. v. United States, 287 F. 2d 726 (3 Cir., 1961). On June 4, 1962, the Supreme Court disposed of the Government's contention in the Lehigh Valley case and on June 13, 1962, the Court of Appeals, in a per curiam decision, affirmed the judgment of the District Court.

(See Summary, Legal Series No. 21, p. 21, for the report on the Lehigh Valley case.)

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SET-OFF - STATUS OF "EQUITY CREDITS"

(Clarke County Cooperative v. W. H. Read,
Miss., 139 So. 2d 639, April 2, 1962)

In this case the cooperative brought an action against a patron on a note, and the patron claimed a set-off. The Circuit Court rendered a judgment adverse to the cooperative and the cooperative appealed. The Supreme Court held that equity credits allocated to a patron on the books of a cooperative do not reflect an indebtedness which is presently due and payable by the cooperative to the patron, and that therefore the patron could not use equity credits as a set-off against the note. Judgment was reversed and entered for the cooperative.

The Cooperative was engaged in the sale of feed, fertilizer, seed, farm supplies and general merchandise. It was organized and existed under the Agricultural Association Law of the State of Mississippi.

W. H. Read bought farm supplies in the amount of $4,281.35, for which he signed a note on October 7, 1959, the note to mature in six months and to bear six percent interest from October 7 and a reasonable attorney's fee. He defaulted and although repeated demands were made upon him, paid no part of the note. Suit was filed December 10, 1960.

Read, in his answer, admitted the validity of the note but denied that he was indebted to the appellant in the sum of $4,281.35. A set-off was filed with his answer alleging a mutual indebtedness between the parties and that the Cooperative was indebted to him in the following amounts: (1) Equities for the years 1953-1958 of $1,803.96; (2) a 1959 rebate on poultry merchandise purchased of $526.18, plus interest; and (3) damages because from May through October 1959 he lost 455 hens at $2.00 each for a total of $910. Accordingly, he admitted that he owed the Cooperative only $1,114.08. Read swore to this set-off.

The court said in part:

> "It is well settled that equity credits allocated to a patron on the books of a cooperative do not reflect an indebtedness which is presently due and payable by the cooperative to such patron. Such equity credits represent patronage dividends which the board of directors of a cooperative, acting under statutory authority so to do, has elected to allocate to its patrons, not in cash or other medium of payment which would immediately take such funds out of the working capital of the cooperative, but in such manner as to provide or retain capital for the cooperative

and at the same time reflect the ownership interest of the patron in such retained capital. The interest will be paid to the patron at some unspecified later date to be determined by the board of directors of the cooperative. The word 'capital' is intended to denote that capital which is of a nature comparable to the earned surplus of a conventional business corporation. The patron has no right to offset such equity credits, not being an indebtedness which is presently due and payable, against an indebtedness which is presently due and payable by him to the cooperative."

* * * * *

"The appellant is a cooperative organized and existing under the Agricultural Association Law of the State of Mississippi, Miss. Code 1942, Rec., Secs. 4475-4493. Section 4482 provides that the affairs of such a cooperative shall be managed and controlled by its board of directors. Section 4486 provides that such organizations are authorized and empowered to acquire and own properties, plants, and other facilities which may be necessary or useful in aiding the cooperative to serve its members. Section 4487 provides a means for such a cooperative to obtain the necessary funds or capital to pay the expense of its operation and to acquire those facilities which are necessary or useful to the cooperative in rendering service to its members. That section provides as follows: 'Such incorporated association may make charges to its members and deductions from the proceeds of their products for services rendered to them for the purpose of paying the expenses of operation and the maintenance and development of such association, and for the creation and maintenance of reserves for the purpose of paying expenses, retiring obligations, acquiring, maintaining and operating property necessary or useful in carrying out the purposes of this act and for caring for contingencies, and such reserves may be used or distributed as may be deemed proper by the board of directors under the by-laws; and such corporation may make patronage dividends or distributions to its members and may do any and all things not unlawful in carrying out the purposes of this act, and shall have and enjoy all the rights, privileges and immunities of other corporations not inconsistent with this act.'

"The by-laws provide: '(2) Such dividends shall be paid either in cash or by credits allocated to the patrons in the Record of Patrons' Equities, or partly in accordance with each of said methods. "Sec. 9. From time to time as cash may be on hand

and available, not needed as an operating fund or for other necessary purposes of the association, the board of directors shall provide for a distribution to be made to the patrons for the purpose of retiring and paying equity credits as shown in the Record of Patrons' Equities. When such payment in cash is made, the oldest equity credits shall be first paid and retired.

'"In any year in which the association may sustain a deficit from its operations, the directors shall have the right to apportion such loss against the accumulated patrons' equities in an equitable manner; and any such application shall ratably reduce the face value of such equity credits, in the redemption thereof."'

* * * * *

/At this point the court cites several cases holding that the constitution and laws of a "benefit society" are binding on its members./

"Dealing specifically with the binding effect of the by-laws of an agricultural cooperative upon the members of the cooperative is the case of Arkansas Cotton Growers Co-op Assn. v. Brown, 168 Ark. 504, 270 S.W. 946, 950, where the court said: 'In fact, it is settled law that the by-laws of a corporation evidence the contract between it and its members or stockholders and govern the transaction between them.'

"To the same effect is Washington Cooperative Egg and Poultry Association v. Taylor, 122 Wash. 466, 210 P. 806, and Young v. Westark Production Credit Association (1953), 222 Ark. 55, 257 S.W. 2d 274.

"A patron of a cooperative having by-laws such as appellant, is bound by such by-laws and cannot contend that when equity credits are allocated upon the books of the cooperative that an indebtedness is thereby created which is immediately due and payable to him by the cooperative.

"The record in the present case reflects that the appellant, in the exercise of its statutory and by-law rights so to do, had established reserves and thereby acquired the capital needed for its operations. This was done through means of the cooperative's crediting its annual 'net savings' or profits to the record of patron's equities rather than paying such savings to

the patrons in cash, for a cash payment would of course have depleted the funds which were available to the cooperative for the purpose of carrying on and developing its business.

"Equity credits are in effect the capital of the cooperative and the revolving-fund plan or equity plan, as in Mississippi, for raising such capital is the most equitable means by which a cooperative can acquire its capital from its patrons. See Bowles v. Inland Empire Dairy Association (D.C. of E.D. Wash., N.D., 1943) 53 F. Supp. 210, 216, where the court said:

" 'Plaintiff contends that defendant has no right to pay dividends out of its present earnings to those who, in past years, have furnished reserves by which defendant was capitalized. In this, he challenges the revolving-fund plan of cooperative financing. "The problem of how equitably to capitalize a cooperative so that the capital furnished by a particular member will bear a direct relation to his patronage and ultimately will be returned to him is believed by many competent cooperative leaders to be solved best through the use of the revolving-fund plan of financing." "Legal Phases of Cooperative Associations," Hulbert, F.C.A. Bulletin No. 50, May, 1942, p. 276. See also, Sanders, " 'Retains' That Nobody Feels," 3 News for Farmer Cooperatives 5-6, Farm Credit Administration, 1936; Sanders, "Organizing a Farmers' Cooperative," Farm Credit Administration Cir. C-108, 42 pp., 1939. Plaintiff complains that defendant waited so long to retire these revolving-fund obligations. The reason for this is explained by Hulbert ("Legal Phases of Cooperative Associations," p. 276) as follows: "The derivation of the name 'revolving-fund plan' becomes more apparent when an association reaches the stage where the oldest investments of the patrons of previous years may be retired. It is only when an association reaches this stage that its revolving-fund begins to revolve.* * * Accumulations or retains for capital purposes, under this plan of financing, should be at least recorded on the books of the association as credits in favor of the proper persons. (This is what the defendant did.) * * * The revolving-fund plan of financing is believed to be the most practicable way of insuring that ultimately all the major contributions of patrons to the assets of an association may be returned to them. The fairness of the plan should make it easier for an association to obtain members and to build up an adequate capital. It provides a means by which the capital of an association increases as its volume of business increases. Many of the most successful agricultural cooperatives use this method of financing. It is being adopted not only by new associations but

by associations which have been operating for many years." The validity of the revolving-fund plan of financing has been specifically recognized by the courts. Reinert v. California Almond Growers Exchange, 9 Cal. 2d 181, 70 P. 2d 190; Adams v. Sanford Growers' Credit Corporation, 135 Fla. 513, 186 So. 239; Ozona Citrus Growers' Association v. McLean, 122 Fla. 188, 165 So. 625; Proodian v. Plymouth Citrus Growers Association, 143 Fla. 788, 197 So. 540; Parker v. Dairymen's League Cooperative Association, Inc., 222 App. Div. 341, 226 N.Y.S. 226; Loomis Fruit Growers' Association v. California Fruit Exchange, 128 Cal. App. 265; 16 P. 2d 1040.'

"See Reinert v. California Almond Growers Exchange, Inc., (Cal. 1936), 63 P. 2d 1114; Driscoll v. East-West Dairymen's Association, (Cal. 1942), 122 P. 2d 379; Lewiston Cooperative Society No. 1 v. Thorpe, 91 Maine 64, 39 A. 283 and In the Matter of F. L. F. Farmers Cooperative Association, Inc. (D.C. of N.J., 1958) 170 F. Supp. 497.

"We are of the opinion that equity credits are not an indebtedness of a cooperative which is presently due and payable. Therefore they cannot be used as a set-off against the note."

The court also found against Read on the other two claimed set-offs. The second claim was based on an oral contract which the court found inadequately proved. The last claim was based on an indefinite assertion that the Cooperative had promised him "technical assistance" through field service, but had not and for this reason the hens died. The court, citing Denton Manufacturing Company, Inc. v. Henderson, Miss., 137 So. 2d 196, held that Read had failed to meet his burden of proof on this point.

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CRIMINAL LAW - APPLICATION TO CORPORATION OWNER OF TRUCK OPERATED IN VIOLATION OF STATE LAW

(State of Wisconsin v. Dried Milk Products Co-op (Dairy Maid Products, Inc.), 114 N.W. 2d 412 (April 3, 1962))

In this case, the Cooperative, as owner of the vehicle and employer of the driver, was convicted in the Circuit Court for Columbia County, Wisconsin, of violating a State statute providing that no person shall operate on a class "A" highway any vehicle or combination of vehicles not complying with certain weight limitations. The defendant appealed. The Supreme Court held that the statute applies to the owner of a vehicle who causes or permits a vehicle to be operated by another, and that construction of the statute as applying to the owner of the vehicle does not render the statute unconstitutional. Judgment was affirmed.

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TRANSPORTATION - ABANDONMENT OF PRIVATE TRUCKING TO USE FOR-HIRE TRANSPORTATION AS UNFAIR LABOR PRACTICE

(Town & Country Manufacturing Company, Inc., et al. and General Drivers, Chauffeurs and Helpers Local Union No. 886, 136 NLRB No. 111)

In this case the National Labor Relations Board found:

1. ". . . That the Respondent violated Section 8(a)(1) of the Act by threatening employees with discontinuance of operations or with discharge or other reprisals because of their activities on behalf of the Union; by promising employees wage increases and other benefits if they voted against the Union; by interrogating employees concerning the identity of supporters of the Union; and, by requiring employees to sign individual work agreements with Respondent under threats of withholding work."

2. ". . . That the Respondent seized upon a pretext when it assigned its ICC difficulties as the reason for subcontracting and discharging its drivers, and that its true motive for doing so was because the men had joined and selected the Union as their bargaining representative. Accordingly, we find that the Respondent discriminatorily discharged its drivers in violation of Section 8(a)(3) when it terminated their employment on November 2, 1959."

3. ". . . That the termination of Respondent's hauling operations was motivated by its opposition to the Union, we find that the Respondent thereby sought to disparage and undermine the Union as majority bargaining agent for its drivers and that the termination constituted a violation of Section 8(a)(5) for this reason."

It ordered the employer to reinstate its private truck operation and reinstate the drivers it fired.

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TRANSPORTATION - EXEMPT COMMODITIES

(W. W. Hughes "Grandfather" Application, MC-105782, Sub. 4, embracing MC-105782, Sub. 3, W. W. Hughes, Extension - Frozen Foods (on further hearing, decided by Division 1))

The Interstate Commerce Commission has refused to go along with an examiner's interpretation that the exemption from economic regulation specified in section 203(b)(6) of the Interstate Commerce Act does not include "deviled crabs, deviled clams, deviled lobsters, croquettes, codfish cakes and any other fish or shellfish products which contain non-exempt ingredients (other than those which properly may be considered as incidental to the cooking process such as seasoning and breading)."

It was the examiner's conclusion that those commodities were no longer fish or shellfish in that they had lost their identities as such and had become new and different products. He said it was clear that deviled products, croquettes and codfish cakes contained ingredients which were non-exempt and that in numerous decisions the Commission had stated that the exempt mixing of non-exempt commodities with exempt commodities destroyed the otherwise exempt status of the latter. It was the examiner's opinion that to the extent administrative ruling No. 110 specified these commodities as exempt, it ought to be over-ruled. Administrative ruling No. 110 was issued in clarification of the changes Congress made in administrative ruling No. 107 in partially adopting that ruling for inclusion in the Transportation Act of 1958.

Considering contentions regarding the examiner's interpretation, the division said it was of the opinion that the legislative intent was in harmony with the opinions shown in ruling No. 110.

Seafood or fish dinners involve the packaging of ordinary non-exempt commodities such as frozen French fried potatoes, French fried onions, cooked broccoli and others, in the same container with the chief course consisting of fish or shell fish, the division said. As long as the fish dinners shared a common initial wrapper or container, and retain the characteristics of a fish or seafood dinner in the ordinary and usual sense, the exemption applied, and the transportation of such dinners was exempt from economic regulations, the division said.

The same items moving in separate packages in the same vehicle would come within the principal of Panther Oil and Grease Manufacturing Co., Contract Car. Application 84 MCC 393, and the exemption would no longer apply, the division said.

"We conclude that the fish and shell fish commodities listed as exempt from economic regulation in ruling No. 110 are correctly so designated," it said.

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TRANSPORTATION - LEASING ARRANGEMENTS - LACK OF CONTROL

(I.C.C. Docket No. MC-C-3361, United Retail Merchants Stores, Inc., et al., decided April 27, 1962, by Division 1)

Lack of control is again emphasized as the prime factor in finding a leasing arrangement between United Retail Merchants Stores, Inc., of Washington State (hereafter called "URM") and six exempt commodity haulers as being in violation of the Interstate Commerce Act since the arrangement did not constitute valid private carriage.

URM, a federation of independent grocers, utilized the services of the six "exempt" carriers under a so-called "master lease", allowing them to lease the vehicles, when they were needed, on a trip basis. This eliminated the necessity of executing a separate lease for each trip.

When URM required a vehicle for the transportation of a shipment from California to Washington, the "lessor" arranged to haul a load of exempt commodities from Washington to California, where he then reloaded and returned to Spokane on behalf of URM. The "lease"was in effect only from the time the carrier picked up URM's shipment in California and delivered it to Washington.

The Commission viewed the operation as outside the law because the lessor did not fully control, direct and dominate the performance of the service.

It ruled that "there was obviously no selection of the driver by the shipper as an employee . . . no negotiation for the amount of the driver's wages . . . (URM) does not maintain a file of health certificates required for drivers . . . has no control over the southbound movement (hence) no way for it to determine in advance the driver's availability under the hours of service regulations for the northbound trip . . ."

Noting that the owner-operators acted "in the capacity of independent contractors, who from time to time agree to do a given piece of work" and that "the individual owners clearly have carrier control of the responsibility for their vehicles at all times," the Commission concluded "that the equipment owners serving URM pursuant to the leasing or rental agreements mentioned are engaged in operations in interstate or foreign commerce as for-hire motor carriers without appropriate authority; and that the shipper respondent is aiding and abetting in the continuance of unlawful operations, in interstate or foreign commerce."

A cease and desist order was entered.

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TAXATION - PATRONAGE REFUNDS - ORAL
PRE-EXISTING LEGAL OBLIGATION

(United States v. Georgetown Farmers Elevator, Inc., 305 F. 2d 376)

On May 29, 1962, the Government's appeal in this case was dismissed at its request. See Summary, Legal Series No. 20, p. 4, for the report on this case.

RECORDED INSTRUMENTS - CONSTRUCTIVE NOTICE

(United States v. Lake County Farm Bureau Cooperative Association, Inc., 205 F. Supp. 808 (1962))

This action was brought by the United States, as chattel mortgagee through the Farmers Home Administration, against the Cooperative, as buyer of mortgaged property. The Cooperative filed a motion to dismiss the complaint on the grounds that the plaintiff had failed to comply with an Indiana statute which required that a chattel mortgage must contain the name of the person who prepared the document before it could be accepted for recording, and therefore, it had no actual notice of the mortgage lien on the property. The plaintiff agreed that the statute had not been complied with but argued that the county recorder had nevertheless filed the chattel mortgage, and that constituted notice of the lien. The court held that the filing of a defective instrument was not notice and, since there was no claim that the Cooperative had actual notice of the plaintiff's lien, on the mortgaged property, it allowed the motion to dismiss the complaint.

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ANTITRUST - TREBLE DAMAGES - AMOUNT OF DAMAGES

(Winckler & Smith Citrus Products Co.
v. Sunkist Growers, Inc., et al.
370 U.S. 917, decided
June 11, 1962)

In Summary, Legal Series No. 21, p. 19, the appeal of Sunkist to the Supreme Court in this same case is reported. In the decision of the Ninth Circuit Court of Appeals, the Court had reversed and remanded the case in part on the issue of damages. (284 F.2d 1, at 29, et seq.) Winckler & Smith Citrus Products Co. had asked certiorari for review by the Supreme Court on this part of the decision. After the United States Supreme Court had reversed the Ninth Circuit on the issue of damages, in its decision of May 28, 1962, it then denied certiorari in the Winckler & Smith appeal. The effect of these combined actions is to completely reverse the judgment of the District Court.

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